

OSHA ETS Injunction Dissolved by 6th Circuit

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

Jef Fagan, NECA General Counsel

Eric J. Conn, *Conn Maciel Carey LLP* (www.connmaciel.com)

NECA has been monitoring the ever-changing vaccination and testing mandate events over the last several months. The latest development is a serious setback to the many challenges to the Biden Administration's efforts to impose a testing and vaccination mandate on private employers.

As it stands today, NECA Chapters and Members should immediately take steps to comply with OSHA's Vaccination, Testing, and Face Coverings Emergency Temporary Standard (ETS) as set forth herein. These efforts should include effects bargaining as described in earlier Legal Alerts.

NECA will be distributing additional guidance, including template forms for the ETS, in the next few days prior to Christmas.

In a remarkable turn of events, at 6:50 PM Friday evening, the United States Court of Appeals for the Sixth Circuit dissolved the nationwide stay of the ETS that had been issued by the Fifth Circuit in November. The Department of Labor and OSHA then nearly immediately issued a statement that the agency was moving forward with implementation and enforcement of the ETS, but also provided some enforcement relief for companies able to demonstrate good faith efforts to comply. Then, within an hour of the Sixth Circuit decision being released, numerous parties filed an emergency application and motion with the US Supreme Court requesting the Court reissue a stay of the ETS. And then, finally, shortly after midnight, South Carolina along with 26 other State Attorneys General and a host of private entities also filed an emergency application for a stay. It was an eventful night.

We briefly summarize the Sixth Circuit's decision below and explain the state of affairs as they sit at this moment, what might occur next and, most importantly, what this means for you and employers across the nation. Bottom line is that events are moving fast, but as we said from the start, you may not want to put a fork in the ETS just yet. It seems to be alive and well at least until we hear from the Supreme Court.

Sixth Circuit Decision

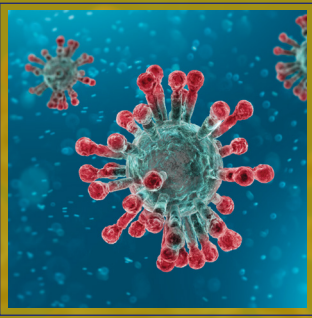
In a [2-1 opinion written by Obama-appointee Judge Jane Stranch](#) and, notably, joined by Bush appointee Judge Julia Gibbons, the Sixth Circuit dissolved the nationwide stay of OSHA's ETS issued by the Fifth Circuit on November 6th. The 3-judge panel that heard the case consisted of one Obama appointee, one Bush appointee and one Trump appointee. Judge Gibbons (the Bush appointee) joined Judge Stranch but also wrote a separate concurring opinion. Trump appointee Judge Joan Larsen, who had purportedly been on a Trump short-list of nominees to the Supreme Court, dissented.

In a nutshell, the Court's rationale for lifting the stay is that the ETS is "an important step in curtailing the transmission of a deadly virus that has killed over 800,000 people in the United States, brought our healthcare system to its knees, forced businesses to shut down for months on end, and cost hundreds of thousands of workers their jobs[.]"



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In addressing the long-established four-factor test to determine whether a stay pending judicial review is merited – that is, (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies – Judge Stranch concluded that “[t]he harm to the government and the public interest outweighs any irreparable injury to the individual petitioners who may be subject to a vaccination policy[.]” OSHA had estimated that the ETS could save more than 6,500 lives and prevent over 250,000 hospitalizations in the six months that it would be in effect.

Additionally, and importantly, the Court recognized that

“[t]he ETS does not require anyone to be vaccinated. Rather, the ETS allows covered employers—employers with 100 or more employees—to determine for themselves how best to minimize the risk of contracting COVID-19 in their workplaces. Employers have the option to require unvaccinated workers to wear a mask on the job and test for COVID-19 weekly. They can also require those workers to do their jobs exclusively from home, and workers who work exclusively outdoors are exempt. The employer—not OSHA—can require that its workers get vaccinated, something that countless employers across the country have already done.”

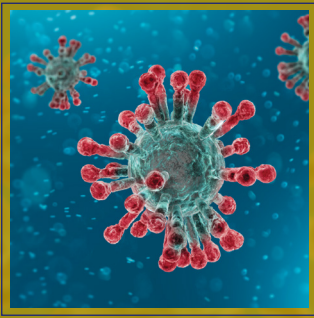
The Court also addressed arguments asserting that COVID-19 is no longer a grave danger and claims that OSHA’s delay in promulgating the ETS is evidence that no grave danger exists. To this, Judge Stranch stated that, “When the pandemic began, [‘]scientific evidence about the disease[’] and [‘]ways to mitigate it were undeveloped.[’] At that point, OSHA chose to focus on nonregulatory options, and crafted workplace guidance [‘]based on the conditions and information available to the agency at that time,[’] including that [‘]vaccines were not yet available.[’] The voluntary guidance, however, proved inadequate, and as employees returned to workplaces the [‘]rapid rise to predominance of the Delta variant[’] meant [‘]increases in infectiousness and transmission[’] and [‘]potentially more severe health effects.[’] At the same time, the options available to combat COVID-19 changed significantly: the FDA granted approval to one vaccine on August 23, 2021, and testing became more readily available. These changes, coupled with the ongoing risk workers face of contracting COVID-19, support OSHA’s conclusion that the time was ripe for OSHA to address the ongoing danger in the workplace through an ETS.”

Deadlines for Compliance

Nearly immediately upon issuance of the Sixth Circuit decision, OSHA updated its website with the snippet below and the [Dept. of Labor issued this news release](#). The agency indicates that it will move forward immediately to implement and enforce the ETS, but thankfully, provides a few additional weeks for employers to be in full compliance with the ETS. **The key first date, to have everything but testing in place, is January 9th followed by implementation of the testing program by February 8th.** Note, however, that technically compliance is required NOW, however, OSHA makes clear that it will use its enforcement discretion to not cite companies for non-compliance between now and the new January/February deadlines ***if they can demonstrate that they have been making good faith efforts to come into compliance.***

Accordingly, we strongly recommend companies continue or reinstitute their efforts to develop the programs required by the ETS and move toward compliance. OSHA enforce-





ment discretion will be offered to only those who can make a serious showing that they are making efforts towards compliance and program implementation. Here is the snippet from OSHA's website released last night, and below that our updated compliance deadline chart:

Litigation Update

OSHA is gratified the U.S. Court of Appeals for the Sixth Circuit dissolved the Fifth Circuit's stay of the Vaccination and Testing Emergency Temporary Standard. OSHA can now once again implement this vital workplace health standard, which will protect the health of workers by mitigating the spread of the unprecedented virus in the workplace.

To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance.



New ETS Compliance Timeline

Employer Requirement	Original Compliance Deadlines	New Post-Stay Compliance Deadlines ^o
Written Vaccination Policy	Dec. 6, 2021	Jan. 10, 2022
Begin Providing PTO for Getting Vaccinated	Dec. 6, 2021	Jan. 10, 2022
Begin Providing Paid Vaccination Recovery Time	Dec. 6, 2021	Jan. 10, 2022
Remove COVID-19 + Cases from the Workplace	Dec. 6, 2021	Jan. 10, 2022
Face Coverings for Unvaccinated Employees	Dec. 6, 2021	Jan. 10, 2022
Confirm Vaccination Status of Workforce	Dec. 6, 2021	Jan. 10, 2022
Begin Testing Mandate (weekly negative test for unvaccinated workers)	Jan. 4, 2022	Feb. 9, 2022

^o So long as an employer is exercising reasonable, good faith efforts to come into compliance w/ the standard

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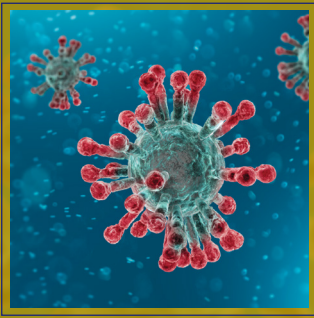
In order to assist with Chapter and Member efforts, NECA will be distributing general compliance templates and guidance shortly.

What Comes Next

The ink was not dry on the Sixth Circuit's decision before a number of parties filed a [joint emergency application and motion](#) with the Supreme Court requesting the Court to, once again, stay the ETS. These parties essentially reiterated the myriad of arguments previously raised by petitioners challenging OSHA's authority to issue the ETS, and, in particular the arguments underpinning the Fifth Circuit original stay decision issued in November. To summarize, they argue that compliance with the ETS would cause critical and exigent circumstances to arise resulting a potentially catastrophic disruptions of businesses across



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the land, massive labor shortages based on employees' refusal to become vaccinated and essentially cause the economy to come to a screeching halt. The parties also raise a series of legal arguments based on OSHA's authority to issue an emergency standard under the circumstances, and more broadly and fundamentally, OSHA's authority to regulate in this area *at all*, even in a non-emergency setting.

Several state attorneys general filed a [second stay application](#) with the Supreme Court. In that application, the position of South Carolina Attorney General Alan Wilson and his counterparts from 26 other states, as well as a long list of companies and organizations, is summed up as follows:

Neither Congress nor the Executive Branch has been bashful about testing the limits of its authority. For that reason, a [“]lack of historical[”] precedent is often [“]the most telling indication[”] that Congress lacked the power to pass a law, or that an agency lacked the power to promulgate a regulation. This case involves a historically unprecedented administrative command. Relying on a decades-old statute pertaining to workplace dangers . . . OSHA promulgated a rule regulating the private healthcare decisions of tens of millions of Americans.”

The AGs further state that this case “does not present the question whether vaccines or vaccine mandates are wise or desirable. Instead, it presents the narrow questions whether OSHA had authority to issue the Mandate, and whether it lawfully exercised whatever authority it had. After all, [“]our system does not permit agencies to act unlawfully,[”] even during a pandemic and [“]even in pursuit of desirable ends.[”]”

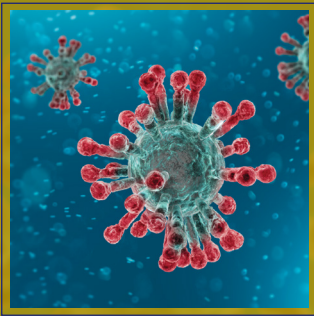
Moving forward

It is up to the Supreme Court to decide the fate of the ETS, at least the fate of OSHA to be able to enforce the ETS until full legal briefing and hearing on the merits occurs. All of the challenges to date have been about whether the ETS should be stayed pending a full review of the legal challenges, which could take numerous additional months to occur. Thus, the request before the Supreme Court is not whether the ETS is a valid regulation, but whether an emergency stay should be granted prohibiting OSHA from implementing and enforcing the stay while the parties and courts prepare to argue the merits.

We will now await the Supreme Court's decision. The Court could simply take a pass and refuse to get involved, or it could hear and decide the stay motion immediately. While it seems obvious to some that the Court, with a solid 6-3 conservative majority, would take up and dispense with OSHA's ETS quickly, putting a new kibosh on the Administration's ETS, it is not entirely clear to us what will occur. Certainly, that is a real possibility, and there may even be a ruling this weekend. However, over the past several months, the Supreme Court has been asked numerous times to issue emergency stays of statewide hard vaccine mandates and in each of those instances it has chosen to remain on the sidelines and abstain from issuing a stay. That does not mean the Court favors these mandates or would validate them in a review of the merits, but simply that the Justices are not actively inserting themselves in the process – or at least they have not done so to date.

The Bottom Line is that we will need to wait and see what the Court decides to do over the remaining days, but, in the meantime, in our view, it would be risky without a stay issued by the Court, to remain in wait-and-see mode without moving toward compliance with the standard. That does not mean you need to put an order in for test kits yet, but to be prudent, it does mean that you should move forward expeditiously to build the administrative





process to support a vax-or-test regiment at your workplaces and to develop the written program documents required by the ETS.

As with most of the COVID-19 legislation and regulation, additional guidance is likely forthcoming. NECA will update its resources, as necessary. Please seek competent legal advice for assistance with any specific factual scenarios.

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